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February 23, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 92-254

Dear Ms. Searcy

Transmitted herewith on behalf of Louisiana Television Broadcasting Company, are an original and five copies of its Reply Comments in the above-captioned proceeding.

Very truly yours

Michelle M. Shanahan

Michelle M. Shanahan

Enclosures

BEFORE THE

Federal Communications Commission

In the Matter of	)	
	)	
Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act	)	MM Docket No. 92-254
	)	
	)	

REPLY COMMENTS OF LOUISIANA TELEVISION BROADCASTING CORP.

Louisiana Television Broadcasting Corp. ("LTBC"), licensee of WRBZ-TV, Baton Rouge, La., herewith submits its reply to certain of the comments submitted in this proceeding.

The institution of this proceeding arises out of the seemingly conflicting provisions of the Communications Act and criminal code that broadcasters carry uncensored political advertisements,[1] refrain from airing obscene, indecent or profane programming,[2] and provide reasonable access to broadcast time for federal candidates.[3] While political advertisements graphically depicting the results of and the process of abortion have provided the factual background, the Commission's adoption of procedures and standards to reconcile the conflicts in the Communications Act cannot depend upon whether one is pro-choice or pro-life. Unfortunately, many of the comments have simply reflected the views

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[1] 47 U.S.C. § 315.

[2] 18 U.S.C. § 1464; 47 U.S.C. § 312(a)(6).

[3] 47 U.S.C. § 312(a)(7).

of a party on that issue rather than a principled, neutral evaluation of the legal issues.

Thus, the National Right to Life Committee, Inc., pro-life candidate Daniel Becker, and numerous television viewers (who, it appears, support the National Right to Life Committee's agenda), have urged the FCC to maintain candidates' unlimited right to air advertisements. On the other hand, Planned Parenthood concentrated on its own agenda: arguing that broadcasters should be permitted to refuse political advertisements which provide private information regarding persons having no relation to the political campaign who perform family planning or abortion services.

Another group of commenters, comprised of the American Civil Liberties Union, the Media Access Project, and a coalition including Action for Children's Television and others, argued simply that depictions of abortion do not fit within the definition of indecency, a finding which could prematurely dismiss consideration of the abortion issue as it applies to the applicable conflicting provisions of the Act without resolving the inherent and explicit tensions of the statutes that surely will arise in another factual context.[4]

In contrast to the comments which effectively encourage adherence to the troublesome status quo, LTBC argued in its initial

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[4]This argument is also sharply at odds with the findings of the U.S. District Court for the Northern District of Georgia, which determined that graphic depictions of abortions were indecent. Gillett Communications of Atlanta, Inc. d/b/a/ WAGA-TV v. Becker, No. 1:92-CV-2544-RHH, 1992 U.S. Dist. LEXIS 17366 (N.D. Ga. Oct. 30, 1992).

comments that broadcasters should be granted the discretion, with only limited FCC review thereof, to refuse to air those political advertisements which they reasonably and in good faith believe to be indecent or to otherwise subject them to criminal liability. For the following reasons, LTBC believes that only such an approach will properly consider and implement the constitutional, statutory and policy issues intertwined in this proceeding.

I. The Limited Exercise of Broadcaster Discretion Reconciles The Conflict Between The Constitutional Rights To Free Speech And Privacy.

The apparently-conflicting constitutional rights to free political speech, see, e.g., Arlington County Republican Comm. v. Arlington County, 790 F. Supp. 618 (E.D. Va. 1992), and to be free of intrusions from indecent or obscene speech in the privacy of one's home, FCC v. Pacifica Foundation, 438 U.S. 723, 748-49 (1978), are reconciled by designating broadcasters as non-governmental gatekeepers. The incentives embodied in the Communications Act, FCC regulations, and safeguards suggested by LTBC[5] would ensure that broadcasters respect each candidate's right to political speech and refuse only those advertisements which attempt to take advantage of the political candidate's unique power to force material upon broadcasters and the public when, in all other circumstances, broadcasting that material may constitute a violation of criminal law. Under this scheme, broadcasters could not prevent candidates from expressing a particular viewpoint, they

[5]Comments of LTBC at 16-17.

could only demand that when expressing their ideas, candidates respect the constitutional rights of viewers.

II. LTBC's Approach Resolves The Conflicts Inherent In The Communications Act And The Criminal Code.

The approach advocated by LTBC also gives meaning to all of the statutes relevant to this proceeding. It recognizes that the advertisements submitted by political candidates should not be censored in the vast majority of cases, as required by Section 315, but it still upholds the interests, such as protecting children and other viewers from harmful and intrusive programming, that support Section 312(a)(6) of the Communications Act and 18 U.S.C. § 1464. In contrast, the National Right to Life Committee, Inc. and other parties opposed to the exercise of broadcaster discretion have effectively urged the Commission to recognize the supremacy of Section 315 over all other statutes involved in this controversy merely because it suits their narrow interests.

The National Right to Life Committee's only attempt to address 18 U.S.C. § 1464 was to suggest (1) that Congress never meant that broadcasters should be held liable for material aired during political advertisements and (2) that concerned broadcasters precede controversial political advertisements with viewer advisories. However, eliminating broadcaster liability in these situations fails to take into account the values which Congress intended to promote when adopting 18 U.S.C. § 1464 and other criminal provisions.[6] Furthermore, viewer advisories are

[6] See Comments of LTBC at 12-14.

incompatible with at least three basic realities of commercial viewing.[7] First, viewers frequently begin watching commercials which are already in progress, thereby rendering an advisory useless. Second, since advertisements are rarely controversial, an advisory may well function as an advertising come-on, inviting the very viewing that the advisory is intended to discourage. Finally, children often watch television without parental supervision; viewing the advisories alone, they may not understand or may become all the more curious.

III. Allowing Broadcaster To Exercise Their Discretion With Limited Review Is The Most Sensible Public Policy.

LTBC offers the most sensible approach from a policy standpoint as well. Consistent with Section 326 of the Communications Act, LTBC's approach places the primary discretion as to whether an advertisement is appropriate for broadcast in the hands of the broadcaster rather than the FCC, as Daniel Becker has suggested.[8] The FCC would only review specific decisions to refuse advertisements when candidates or viewers offered extrinsic evidence of the broadcaster's bad faith or abuse of discretion. See Hunger in America, 17 R.R.2d (P & F) 674 (1969). In the absence of this extrinsic evidence, the FCC's participation would be confined to a broad review of all the broadcaster's decisions during the renewal process. Such an approach properly places the initial and primary power to review the substantive content of

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[7]Comments of National Right to Life Committee, Inc. at 9-10.

[8]Comments of Daniel Becker at 6.

purportedly "political" speech in the hands of the smallest unit with the least capacity to deny access to candidates wrongfully, while limiting the degree of government entanglement in the journalistic decisions of the media.

Respect for the exercise of broadcaster discretion as advocated by LTBC avoids inevitable accusations that the FCC is a partisan in this, or similar, wrenching political debates. It also reaches a practical solution for carrying out the government interests in protecting viewers from indecent programming. If all editorial decisions regarding problematic advertisements were subject to de novo review by the FCC, broadcasters might well seek the refuge of FCC review and judicial oversight thereof, just to be certain. Such a process would not work well to protect all of the statutory interests, including the candidates' need to know promptly whether access is available, since the FCC has stated that it will not review advertisements prior to broadcast. In any event, the ability of the FCC and the judiciary to timely discharge such a responsibility under the pressures of an imminent election is limited,[9] and the wisdom of doing so in the face of these pressures is suspect.

Moreover, LTBC's approach recognizes the constitutional dimensions in a broadcaster's exercise of journalistic choice and eliminates the need for a serious challenge to the

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[9]See Gillett Communications of Atlanta, Inc. d/b/a/ WAGA-TV v. Becker, No. 1:92-CV-2544-RHH, 1992 U.S. Dist. LEXIS 17366 (N.D. Ga. Oct. 30, 1992).

constitutionality of the Communications Act's control over the content of broadcasting. Given the continued tension between the frequently-attacked justification for regulating broadcasters and the journalistic freedom enjoyed by the print media, LTBC's approach avoids serious questions regarding the distribution of responsibility for the content of political speech between broadcast journalists and the government.

IV. Conclusion

The comments submitted in this proceeding demonstrate that the FCC should authorize broadcasters to refuse to air political advertisements which they reasonably and in good faith believe to be indecent or to otherwise subject them to criminal liability. This approach strikes the appropriate balance between competing constitutional, statutory and policy interests.

Respectfully submitted,

LOUISIANA TELEVISION BROADCASTING CORP.

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February 23, 1993

CERTIFICATE OF SERVICE

I, Michelle M. Shanahan, hereby certify that I have this 23rd day of February, 1993, sent by U.S. Postal Service, postage prepaid, or caused to be hand delivered, copies of the foregoing "REPLY COMMENTS OF THE LOUISIANA TELEVISION BROADCASTING CORP." to the following:

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